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In the Supreme Court of the United States

OCTOBER TERM, 1958

NO. 163

UNITED STATES STEEL CORPORATION, *Appellant*,

v.

STATE OF WASHINGTON, *Appellee.*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS

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STATE PRINTING PLANT, OLYMPIA, WASH.

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the appeal be dismissed on the ground that the appeal does not raise a substantial Federal question.

STATUTES INVOLVED

The tax involved in the above appeal is imposed by RCW 82.04.220, RCW 82.04.250 and RCW 82-.04.270, §§ 1-4 (c) and (e), chapter 5, Laws of 1950, Ex. Sess. § 1-4 provides:

"From and after the first day of May, 1935, there is hereby levied and there shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be, as follows:"

Section 1-4 (c) provides:

"Upon every person engaging within this state in the business of making sales at retail; as to such persons, the amount of tax with respect to such business shall be equal to the gross proceeds of sales of the business, multiplied by the rate of one-quarter of one per cent;"

STATEMENT OF THE CASE

This case was initiated by appellant in the Superior Court of the State of Washington to recover a refund of the business and occupation tax assessed against it by the state for the privilege of engaging in business in the state of Washington. The action was for a refund of the *entire* amount of the taxes paid by the appellant with respect to the sales of goods to Washington customers which were not warehoused in the state of Washington prior to sale. In its action in the Superior Court of the State of Washington appellant *did not ask for an apportionment* of any amount of the tax. Contrary to the implication from appellant's statements on page 2 of its Jurisdictional Statement, appellant did not base its claim of invalidity on the failure of the State Tax Commission to apportion the tax but sought the

refund solely on the ground that the tax was unlawfully imposed with respect to sales immune from taxation under the Commerce Clause of the Federal Constitution.

FACTS

The appellant is qualified to conduct business in the state of Washington. Its business consists of the manufacture and sale of iron and steel products. Insofar as the controversy involved here is concerned, all of its products were manufactured outside the state of Washington. Approximately 25% of the products sold in the state of Washington were manufactured by the appellant itself. The remaining 75% of the products sold by appellant were acquired from other manufacturers and in turn sold to appellant's Washington customers.

During the period in question the appellant rented warehouse space within the state of Washington in which it maintained one stock of goods—wire rope. Business and occupation tax was paid upon all sales from this warehouse, and those sales are not in issue here.

In the conduct of its business activity in the state of Washington, appellant maintained a sales office within the state employing 42 persons, all of whom were residents of the state. Salesmen from the Seattle office called upon prospective purchasers and when a sale was made the customer's order was acknowledged by the Seattle office. The Washington

employees in the Seattle office investigated the customer's credit and generally gave final credit approval and negotiated the terms of payment. Orders would be forwarded by the Seattle office to the mill producing the particular product ordered. When the mill advised that the goods ordered would be available, Seattle office employees mailed the customer a written acknowledgment of the order, which constituted acceptance.

Seattle personnel investigated customer complaints and made recommendations as to settlements to be approved by appellant's San Francisco office. If requested appellant supplied engineering service to its customers to check complaints relative to goods purchased and for consultation services within the state.

Delinquent accounts were pursued by appellant's Washington office and the customers made payment for the goods to appellant's offices within or without the state, whichever the customer preferred. The appellant maintained a bank account in the state of Washington to which its payments were deposited. Substantially all contacts with Washington customers relating to any matter connected with a sale were made by the Seattle office. During the 17 months from August 1, 1950, through December 31, 1951, appellant's Washington office sold $20,319,096.81 worth of goods to Washington customers.

The tax was sustained by the State Superior Court (unreported) and the State Supreme Court,

reported unofficially at 151 Wash. Dec. 200, and set forth as Appendix A in Appellant's Statement as to Jurisdiction.

In upholding the validity of the tax, the Washington Supreme Court stated:

> "Appellant argues that the tax should be apportioned between interstate and local activities. There is no question of apportionment here. The tax is measured solely by appellant's local wholesale and retail activities. No part of the tax is attributable to its manufacture or other out-of-state activities. The sales are negotiated within the state of Washington, and the fact that delivery is made direct to the purchaser does not change the nature of the local transaction. *Norton Co. v. Department of Revenue of the State of Illinois*, 340 U. S. 534, 95 L. ed. 517, 71 S. Ct. 377; *Field Enterprises Inc. v. State, supra.*"

ARGUMENT

I.

NEITHER THE COMMERCE CLAUSE NOR ANY APPLICABLE DECISION OF THE UNITED STATES SUPREME COURT REQUIRE REDUCING THE AMOUNT OF THE TAX IMPOSED UPON APPELLANT'S LOCAL SALES ACTIVITY.

Appellant now concedes as illustrated by the questions raised on appeal that its sales activity in the state of Washington subjects appellant to the taxing power of the state. Thus, appellant acknowledges there was sufficient local activity to sustain the imposition of the tax without doing violence to the Commerce Clause of the Federal Constitution.

Accordingly, this appeal does not challenge the imposition of the tax, but only the amount.

Recognizing that it would be impossible to convince this Court that the decision of the Supreme Court of the State of Washington was in error in finding sufficient local activity, appellant hopes by this appeal in raising an issue of apportionment to achieve the same result. Although appellant attempts to convince this Court that the instant case represents an issue of apportionment, it is apparent that rather than apportionment being involved appellant actually is contending that because it manufactures its product in one state which may be sold by its personnel in another that the tax imposed on sales activity by the state of the buyer should to some extent be reduced or be less than the full measure of the tax because the manufacturing process is conducted in the other state. In substance, appellant, though conceding its activity is taxable, is now urging that it shouldn't have to pay the full measure of the tax, but only a part of it.

This appeal should be dismissed because the issue raised has already been decided by this Court in *Field Enterprises v. State*, affirmed, 352 U. S. 806; *Norton Co. v. Dept. of Revenue*, 340 U. S. 534, 95 L. ed. 517 (1951); and *B. F. Goodrich v. State*, 38 Wn. (2d) 663; Cert. denied, 342 U. S. 876, 96 L. ed. 659.

A.

Although apportionment in a proper case is a method assuring an equitable division among the several states of taxes upon multi-state business, this case does not represent such a situation. In the instant case the tax involved has as its incident the local selling activities of appellant and is not imposed upon selling activities conducted in any other state. The measure of the tax is simply the rate times the gross proceeds of local sales.

The United States Supreme Court has never held that a tax similar to that involved here imposed upon a local activity must be reduced (or apportioned as appellant suggests) because the taxpayer engages in other and different activities in other states. Only those taxes which are imposed upon incidents which can be equally reached by several states must be apportioned. Where the incident is such that only one state can impose a tax there is obviously no reason or justification for reducing the measure of the tax.

The instant appeal involves the same issue as presented in *Field Enterprises v. State, supra,* 47 Wn. (2d) 852, affirmed, 352 U. S. 806 (1956). This case involved the same statute here involved and practically the identical method of conducting business. The only significant distinction in the facts is that appellant's local activity in this case is of considerably greater magnitude and substance than was the case in *Field Enterprises.*

Had this Court felt that the amount of the tax must be reduced because of the relevancy and validity of the issue of apportionment, the United States Supreme Court would not have affirmed the judgment of the highest court of the state of Washington in the *Field Enterprises* case. Appellant in support of its contention that a substantial federal question is presented by its appeal has not and cannot refer the court to any case involving a similar tax on a similar activity requiring the tax be reduced or something less than the full measure upon an admitted local activity.

B.

In its statement as to jurisdiction appellant relies principally upon *J. D. Adams Mfg. Co. v. Storen*, 304 U. S. 307 (1938), and *Hans Rees' Sons v. North Carolina ex rel. Maxwell*, 283 U. S. 123 (1931). Neither of these two decisions are applicable or sustain the contention advanced by appellant.

In the *Adams Mfg.* case the court simply held that Indiana could not impose a gross receipts tax on the *sales* of goods because the products were manufactured in Indiana. The court struck down the tax because it

> "is of such a character that if lawful it may in substance be laid to the fullest extent by states in which the goods are sold as well as those in which they are manufactured."

The court in the *Adams* case further noted the Indiana tax was

> "not an excise upon the privilege of producing or manufacturing within the state."

It is thus clear that the "multiple burden" danger properly concerning the court in the *Adams* case is not present here. The Washington tax on gross proceeds of sales to Washington customers cannot be duplicated by any other state.

Hans Rees' Sons v. North Carolina, supra, likewise offers appellant no support for its position. We have no quarrel with the above decision. It has no application here. *Hans Rees* involved a *net income* tax on a unitary business. The instant controversy involves an excise tax—not a net income tax. While apportionment was proper in *Hans Rees*, the court has never found such a requirement to be applicable to the type of tax on the kind of local activity involved herein. A comparison of *Hans Rees* with *American Mfg. Co. v. St. Louis*, 250 U. S. 459 (1919) makes this distinction apparent.

In the *American Mfg. Co.* case an excise tax upon the privilege of manufacturing was sustained even though measured by gross receipts of sales made outside the taxing state. No apportionment was required.

C.

On page 8 of Appellant's Statement as to Jurisdiction, the following statement appears which should not stand unchallenged:

> "If every state levied a tax such as the Washington business and occupation tax (a tax upon the privilege of engaging in business activities without regard to the extent to which those activities occur within the state) each interstate business would pay *double* the tax paid by its local competitors."

Not only is the above observation without support in fact but as a legal conclusion is untenable. In the first place the instant tax, as stated before, is restricted in measure to gross proceeds of sales to Washington customers. The extent of appellant's activity subject to the tax is limited to its local activity within the state of Washington — nothing more—nothing less. The incidence of the tax has clear regard only to the results dollarwise of the sales activity of appellant's personnel soliciting business in Washington.

This fact destroys the validity of appellant's unsupportable conclusion that appellant is to pay "double the tax paid by its local competitors." Appellant is not taxed twice by Washington's business tax. No other state can subject appellant to taxation of its gross proceeds of sales derived from Washington customers. The fact that appellant may pay a

different tax on a different activity to a different state for privileges accorded by that state is not a material fact nor a valid circumstance in determining any possible conflict between the Washington tax and the provisions of the Federal Commerce Clause. There is nothing inherent in the tax as applied to appellant on its Washington activity which is in any sense in conflict with the standard or rule announced in *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250 (1938).

II.

NO DISCRIMINATION AGAINST APPELLANT CAN BE SHOWN BECAUSE APPELLEE FAILED TO REDUCE THE TAX.

For two pages, commencing on page 18 of Appellant's Statement as to Jurisdiction, it is suggested that the tax involved here discriminates against interstate commerce. No authority is cited by appellant in support of this assertion. Among others, the case of *B. F. Goodrich v. State*, 38 Wn. (2d) 663, Cert. denied, 342 U. S. 876, 96 L. ed. 659 (1951), completely disposes of appellant's contention in this respect.

CONCLUSION

It is respectfully submitted that no substantial Federal question is raised by the appeal and it should be dismissed.

July 25, 1958.

Respectfully submitted,

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